Office - Supreme Court, U.S.
FILED
MAY 15 1984
ALEXANDER L. STEVAS,
CLERK

83 - 1863

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

BILLY L. LIGHTLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MITCHELL A. LEE
Counsel of Record

GENE STIPE
Stipe, Gossett, Stipe, Harper, Estes, McCune and Parks
P.O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

Attorneys for Petitioner

May, 1984

41pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Tenth Circuit, and the United States District Court for the Western District of Oklahoma, allowed evidence of other crimes and pleas of guilty by third parties who were not charged or involved with the Petitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

BILLY L. LIGHTLE,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Billy L. Lightle, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on February 29, 1984, rehearing denied March 27, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit will shortly be published in the Federal Reporting system. The opinion was styled United States of America, Plaintiff-Appellee versus Billy L. Lightle, Defendant-Appellant, No. 82-2477. No opinions were rendered by the trial court.

JURISDICTION

The Petitioner is seeking a Writ of Certorari to the United States Court of Appeals for the 10th Circuit to review its opinion affirming the trial court's conviction of the Petitioner. Jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Rule 401 of the Federal Rules of Evidence provides:

> "Definition of Relevant Evidence. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Rule 402 of the Federal Rules of Evidence provides:

> "Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

Rule 403 of the Federal Rules of Evidence provides:

> "Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 404 of the Federal Rules of Evidence Provides:

"Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes. (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Title 18 U.S.C. Section 1951 provides:

"Interference with commerce by threats or violence. (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery, extortion or attempts or conspires so to do, in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151 through 161 of Title 29 or sections 151-188 of Title 45."

Title 18 U.S.C. Section 1341 provides:

"Frauds and swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose

of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, Section 34, 63 Stat. 94.

Title 18 U.S.C. Section 1342 provides:

"Fictitious name or address. Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in Section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitous, false or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both." June 25, 1948, c. 645, 62 Stat. 763.

Title 18 U.S.C. Section 7206 provides:

"Fraud and false statements. Any person who—

(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or . . ."

STATEMENT OF THE CASE

A. *Procedural Background of the Case*

The Petitioner herein, Billy L. Lightle, was indicted by a Federal Grand Jury in the Western District of Oklahoma on May 6, 1982, and was charged in a 52-Count Indictment, charging him with 45 Counts in Violation of 18 U.S.C. Section 1341 and 1342 (Mailfraud); 3 Counts of Violation of 18 U.S.C. 1951 (Obstructing Interstate Commerce by unlawfully obtaining under the color of official right, money to which he was not entitled and due to his position as County Commissioner); and 4 Counts of 26 U.S.C. 7206(1) (Knowingly making false tax returns). During the trial of the case, Count 39, a mailfraud count, was withdrawn by stipulation of the parties.

The trial was commenced on September 21, 1982, and continued through September 29, 1982, when the jury returned the verdict of guilty as to Counts 1 through 38 and 40 through 52. On November 15, 1982, the Petitioner was sentenced to 5 years on each of Counts 1 through 38 and 40 and 45; 12 years on each of Counts 46 through 48; and 3 years on each of Counts 49 through 52, all of said sentences to run concurrently. The Petitioner was also fined the sum of $10,000.00 on Count 46. The Petitioner thereinafter timely filed his appeal to the United States Court of Appeals for the Tenth Circuit, which rendered its opinion affirming the trial court on February 29, 1984. A copy of the opinion of the United States Court of Appeals for the Tenth Circuit is attached hereto as Appendix "A".

Petitioner herein timely petitioned the Court of Appeals for a rehearing in his case, with Petition for Rehearing

being denied by the Court of Appeals on March 27, 1984. A copy of the Petition for Rehearing, and the Tenth Circuit Opinion overruling same is attached hereto as Appendices "B" and "C".

B. *Relevant Facts Underlying the Petitioner's Conviction*

The Petitioner's case is one of many that arose from an extensive investigation by the F.B.I., the I.R.S., and the United States Attorneys for Oklahoma into the payment to numerous County Commissioners of kickbacks, by suppliers of equipment or materials purchased by the various counties in Oklahoma for road and bridge building, and maintenance. During the period set forth in the indictment, the Petitioner was the duly elected County Commissioner of Kingfisher County, State of Oklahoma. The pertinent introductory allegations of the indictment are set forth as follows:

"COUNT 1

1. At all times material to this Indictment, BILLY L. LIGHTLE, the defendant herein, was an elected County Commissioner for Kingfisher County, Oklahoma.

2. At all times material to this Indictment, BILLY L. LIGHTLE, in the performance of his official duties as County Commissioner would place orders and arrange the purchase of materials and supplies from various vendors doing business with Kingfisher County, thereby causing the County Clerk's Office of that County to encumber funds and send through the U.S. Mails County Warrants or checks in payment for the materials and supplies purchased.

3. At all times material to this Indictment, BILLY L. LIGHTLE was under a duty to the citizens of Kingfisher County to perform the functions of his office

openly, honestly, impartially, free from corruption and undue influence, without receiving directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to his office other than the compensation allowed by law.

4. During the period commencing on or about January 6, 1975, and continuing thereafter to on or about March 3, 1981, BILLY L. LIGHTLE, the defendant herein, while serving as County Commissioner of Kingfisher County, devised and intended to devise a scheme to defraud the citizens of Kingfisher County out of their right to have the business of Kingfisher County openly, honestly, impartially, free from corruption and undue influence, and in accordance with the Official Oath of Office by their elected County Commissioner, and to use the U.S. Mails in furtherance of the scheme.

5. As a part of this scheme to defraud the citizens of Kingfisher County, BILLY L. LIGHTLE, in his official capacity as a County Commissioner of Kingfisher County did place orders and arrange the purchase of road and bridge building and maintenance materials and supplies for Kingfisher County from various vendors, and, in particular, Darwin L. Allred, d/b/a Allred Supply; Richard Irwin, d/b/a Independent Industries; James E. Palmer, d/b/a United Industrial Sales; Doyle E. Taylor, d/b/a Hap Taylor Material Company; and Bob L. Detrick, a salesman for Thurman Bridge and Block Company. It was a further part of the scheme that the defendant did receive from these sellers of road and bridge building maintenance supplies cash kickbacks.

6. That on or about October 3, 1977, in the Western Judicial District of Oklahoma,

——————— BILLY L. LIGHTLE ———————,

the defendant herein, for the purpose of executing the

aforesaid scheme to defraud the citizens of Kingfisher County, and attempting to do so, did cause to be placed in an authorized mail depository, to be sent and delivered by the U.S. Postal Service, Enid, Oklahoma, an envelope containing County Warrant Number 351, in the amount of $3,529.30, all in violation of Title 18, United States Code, Section 1341 and 1342."

Fourteen witnesses testified for the Government during its Case-in-Chief. These witnesses, who were suppliers, essentially testified that they sold equipment to the Petitioner, and that they thereinafter paid the Petitioner a cash kickback. The critical issues surrounding the testimony of the Government's witnesses arose during the testimony of Hugh Thurman, and Bob Detrick. Thurman testified that his company had a policy of paying kickbacks to County Commissioners who purchased materials and supplies from his company (Trial transcript, page 241). Ninety-Five percent of the County Commissioners took kickbacks in the range of five to ten percent (5% to 10%) (transcript 242). Mr. Thurman named the Petitioner as having been paid kickbacks since 1975, along with the other two County Commissioners in Kingfisher County (transcript 249,251).

Bob Detrick testified that he had paid the Petitioner kickbacks, and that he was paid once a month, as were the other two County Commissioners.

Twenty witnesses, including the Petitioner, testified for the Petitioner in his Case-in-Chief. The crucial issue arose during the testimony of William F. Winkler, Petitioner, Pauline Griffith, and Jimmy Payne. Over repeated objection by defense counsel, the Government was allowed to cross-examine the defense witnesses as to whether or not

they knew that the other two Commissioners, from Kingfisher County, George Walta and Floyd Rudd, had resigned from office and plead guilty to the charge of receiving kickbacks. As set forth hereinabove, in the relevant portion of the introductory paragraphs of the indictment in the case, the Petitioner herein was not charged with having conspired, or schemed, with either Mr. Walta or Mr. Rudd. The evidence was allowed as proof of the scheme as alleged in the indictment. Once again, it is crucial to note that this evidence in no way reflected upon the Petitioner herein, Billy Lightle.

On appeal to the United States Court of Appeals for the Tenth Circuit, the Petitioner argued that it was error to admit the evidence of alleged kickbacks being paid to the other two Commissioners, and their subsequent resignations and pleas of guilty. In apparent reliance upon the Brief of the Government filed in the Court of Appeals, the Tenth Circuit determined that the evidence relative to the other Commissioners was unobjected to, thereby limiting the Court of Appeals consideration of same under the Doctrine of Fundamental Error. As will be set forth hereinafter, the evidence of other crimes and pleas of guilty relative to Mr. Walta and Mr. Rudd, were in fact objected to by defense counsel.

EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the United States District Court for the Western District of Oklahoma for violations of Title 18 U.S.C. Sections 1341 and 1342; 18 U.S.C. Section 1951; and 26 U.S.C. Section 7206(1).

REASON FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit, in affirming the trial court, allowed evidence of other crimes not charged against the Petitioner, and further allowed evidence of the guilty pleas of other parties who were not charged with the Petitioner. In so doing, the United States Court of Appeals for the Tenth Circuit sanctioned the departure of the trial court from the accepted and usual course of judicial proceedings in that both the trial court, and the Court of Appeals, seemingly ignored this Court's applicable decisions, and apparently issued an opinion which conflicts with opinions set forth in other circuits.

I. THE FINDINGS OF THE TRIAL COURT AND THE COURT OF APPEALS THAT EVIDENCE OF OTHER PARTIES' ALLEGED CRIMINAL ACTIVITY, AND SUBSEQUENT GUILTY PLEAS, WAS ALLOWABLE AS PROOF OF THE SCHEME ALLEGED IN THE INDICTMENT AGAINST THE PETITIONER HEREIN, IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF OTHER CIRCUITS.

As stated above, the Petitioner herein was *individually charged* with having devised, and intending to devise a scheme to defraud the citizens of Kingfisher County out of their right to have the business of Kingfisher County conducted openly, honestly, impartially, free from corruption and undue influence, and in accordance with his Official Oath of Office as a duly elected County Commissioner, and to use the United States Mails in furtherance of the scheme. The Petitioner herein was not charged with conspiracy, nor were there any named, or unnamed, indicted, or unindicted co-conspirators. It was further never alleged, nor

proven, that the Petitioner herein devised or intended to devise any type of scheme with the other two duly elected County Commissioners of Kingfisher County, George Walta and Floyd Rudd. Nonetheless, the trial court allowed evidence in the Government's Case-in-Chief through the testimony of Hugh Thurman and Bob Detrick, that the witnesses had, in fact, paid kickbacks to Mr. Walta and Mr. Rudd. The issue initially arose during the questioning of Hugh Thurman by the Government, as follows:

"Q. Who, if anybody, was paid kickbacks in Kingfisher County from January 1975, on?

A. The names?

Q. Yes.

A. Mr. Lightle, Mr. Rudd, and Mr. Walta.

Q. Those people all received kickbacks from — from Mr. — from your company.

A. Yes." (Trial transcript volume 1, page 249 lines 7 through 14).

The initial question was not objected to by defense counsel, for obvious tactical considerations, which apparently was the basis of the Court of Appeals' determination that the evidence was allowed in without objection.

It is important to note, however, that it initially became clear to the defense that the Government was going to elect to pursue this line of questioning when the second question relative to Mr. Walta and Mr. Rudd was asked by counsel for the Government. This second question occurred just a few moments later in the trial as follows:

"Q. And who were kickbacks paid to on those four transactions?

A. Well, they were paid to different ones.

Q. Well, who?

A. On this one right here, number 104, there are three invoices. There is one — material was delivered to Mr. Rudd, County Yard at Kingfisher. This one is to Mr. Lightle, and this one is to Mr. George Walta.

Q. And who — who is Walta and Rudd, who are they?

MR. GOTCHER: Objection, your Honor, incompetent, irrelevant and immaterial. Doesn't prove or disprove anything.

THE COURT: Overruled."
(Trial transcript page 259, lines 4 through 16).

Obviously, when it became apparent to counsel for the Petitioner that the Government was going to attempt to introduce evidence of crimes of parties not charged in the indictment, counsel for the Petitioner made a timely objection. In fact, only three questions later, the Government again returned to the area of crimes allegedly committed by parties other than the Petitioner:

"Q. Now, are you testifying that your company paid kickbacks to all three County Commissioners there —

MR. GOTCHER: Objection, Your Honor. Mr. Rudd and Mr. Walta — what ever they did has no bearing on this.

THE COURT: Overruled."
(Trial transcript page 260, lines 6 through 10).

A few moments later the Government again returned to this line of questioning:

"Q. Were kickbacks paid on those three transactions to all three Commissioners at the time those sales were made, or to just Mr. Lightle?

MR. GOTCHER: Objection, Your Honor. Again, this was to all three County Commissioners. He can't even point one out. He said rather than to one district it was to all of them. Mr. Rudd and Mr. Walta, whatever they did has no bearing on this issue.

THE COURT: Overruled."
(Trial transcript page 262, line 1 through 8).

Counsel for the Government again returned to the issue while still questioning Mr. Thurman:

"Q. How long have you known Floyd Rudd?

MR. GOTCHER: Your Honor, objection as to this. It's outside the scope of the indictment. It's incompetent, irrelevant and immaterial. Goes to prove not probative fact.

MR. WATERS: I guess to the man's credibility.

THE COURT: Overruled. Proceed, please.

Q. (BY MR. WATERS) Did you leave Mr. Rudd off that List?

A. Yes, sir, I did.

Q. Was he from Kingfisher County?

A. Yes, sir.

Q. And Mr. George Walta, did you leave him off the list?

A. Yes, sir, I did.

Q. Is he from Kingfisher County?

A. Yes, sir.

Q. And Mr. Lightle?

A. Yes, sir.

Q. Did you leave him off the initial list?

A. Yes, sir.

Q. Tell me, how long have you known George Walta?

A. I've known George Walta, I expect, probably ten to twelve years.

Q. Floyd Rudd, how long have you known him?

A. Longer than that, Probably 20 years.

Q. Were those good friends of yours?

A. Yes, sir.

Q. And they were serving with Mr. Lightle, were they not —

A. Yes, sir.

Q. —at the time you were paying kickbacks to them, too; is that correct?

A. Yes, sir."

(Trial transcript pages 287, 288, lines 17 through 25).

Then, on redirect examination, counsel for the Government again improperly questioned Mr. Thurman:

"Q. Have you ever — you testified earlier that you paid kickbacks to Mr. Walta and Mr. Rudd, is that correct?

A. Yes.

Q. In Kingfisher County?

A. Yes, sir.

Q. Were those Commissioners serving at the same time you were paying kickback money to Mr. Lightle?

A. Yes, sir.

Q. Was Bob Detrick the salesman who delivered the kickback money to those two County Commissioners?

A. Yes, sir.

Q. Did you ever receive any complaints from Mr. Walta or Mr. Rudd that they hadn't received their kickback money?

MR. GOTCHER: Objection, your Honor. Its repetitous, and outside the scope of this whole proceeding.

THE COURT: Overruled."

Then, in an obvious attempt to further prejudice this Petitioner, counsel for the Government questioned as follows:

"Q. (BY MR. WATERS) Tell me, have you ever testified in a Court of Law before, Mr. Thurman?

A. Yes, sir.

Q. On other County Commissioner cases?

A. Yes, sir.

MR. GOTCHER: Objection, your Honor. Incompetent, irrelevant and immaterial. Outside the scope.

THE COURT: Overruled."
(Trial Transcript page 325, lines 11 through 18).

The Petitioner herein would submit that while it is obvious that the original question to Mr. Thurman was not objected to, each and every remaining question elicited a timely objection from counsel for the Petitioner. The court,

recognizing the obvious prejudicial impact of the line of questioning, determined, on its own, to give a cautionary instruction to the jury as follows:

> "THE COURT: Well, that would fit very nicely if we can proceed on that basis. Gentlemen, also, on another point, as you both know, I have permitted the Government to introduce evidence of kick-backs being paid to other County Commissioners on the basis that it is evidence of a part of the general scheme charged. I think that that is a proper ruling, however I think it would be far more correct if I gave a cautionary instruction to the jury in regard to that evidence, which I intend to do, unless you ask me not to.
>
> MR. GOTCHER: No, sir.
>
> THE COURT: It would, in substance, simply limit their consideration of that evidence to evidence of the existence of a scheme as charged, but not to the involvement of that Defendant, without more, and that, in any event, of course, is for them to give such weight and credit to any testimony as they feel it is entitled to receive. That is about what I except to give." (Trial transcript pages 346, 347, lines 17 through 25 and 1 through 8).

It is important to note, as set forth hereinabove, that the scheme alleged in the indictment was simply that the Petitioner devised and intended to devise a scheme to defraud the citizens of Kingfisher County from open, honest, and impartial Government. Neither in the indictment, nor at trial, was any evidence presented that the Petitioner was involved in any type of scheme with the other County Commissioners. Indeed, most tellingly, Mr. Thurman testified that neither he nor his company discussed their deal-

ings with the Petitioner with any other County Commissioner. Mr. Thurman testified as follows:

"Q. Did your company make it a policy of telling the other County Commissioners in a particular County who and which Commissioners were receiving kickbacks?

MR. GOTCHER: Objection. Hearsay. There is no bearing, again, your Honor, and incompetent, irrelevant and immaterial.

THE COURT: Overruled.

A. No, sir, we never talked about any transactions with the others.

Q. In other words, if you were paying Commissioner 'A', or Mr. Lightle, for example, you never told Mr. Rudd or Mr. Walta that you were paying Mr. Lightle; is that correct?

A. That's correct.

Q. And, conversely, you never told Mr. Lightle, or any of the other Commissioners, you were paying Mr. Rudd; is that correct?

MR. GOTCHER: Objection, leading and suggestive.

THE COURT: Overruled.

A. That's correct. We did not."

Notwithstanding the obvious prejudicial impact of the evidence of the alleged crimes of the other two County Commissioners for Kingfisher County, the prosecution was alleged to compound the prejudicial error during its cross-examination of the defense witnesses. The first witness called by the Petitioner, William Winkler, was cross-examined as follows:

"Q. And, yet, Mr. Winkler, you are aware of the fact, are you not, that George Walta resigned from office.

MR. McCUNE: I am going to object to what Mr. Walta did is totally irrelevant.

THE COURT: Overruled.

MR. WATERS: May I rephrase my question, then,

THE COURT: I think you probably should.

Q. Yet, Mr. Winkler, you are aware of the fact, are you not, that while you were doing business with Mr. Walta that he resigned from office for taking kickbacks while being County Commissioner there in Kingfisher County?

A. I read this in the paper. Yes, sir."

Mr. William Morrow, the third witness called by the defense, was cross-examined as follows:

"Q. Some of that was sold through the shop foreman. Tell me, if Mr. Rudd were on trial today, you could receive—you never paid him any kickbacks too, couldn't you?

A. That's true.

Q. And yet you were aware of the fact that — that he's plead guilty to taking kickbacks, are you not, while he was County Commissioner in Kingfisher County, isn't that right? Haven't you read that in the paper?

A. I read that in the paper.

Q. Allright.

THE COURT: Just a moment.

MR. GOTCHER: Mr. Rudd is not on trial. Whatever Mr. Rudd did has no bearing whatsoever on Mr.

> Lightle. They are trying to paint him guilty by association."

Immediately following the question to Morrow, the Court incorrectly stated as follows:

> "THE COURT: Well, that has been the subject of very careful cautionary instructions throughout the trial. The objection is overruled. The jury will be reminded of those instructions."

The simple fact of the matter is that the jury only received one cautionary instruction relative to the evidence presented against Mr. Walta and Mr. Rudd. Even more importantly, this cautionary instruction was given during the Government's Case-in-Chief, when the testimony only referred to the fact that Mr. Walta and Mr. Rudd had allegedly been paid kickbacks by the Government's witnesses. During cross-examination of the defense witnesses, however, the fact that Walta and Rudd had *plead guilty* was brought before the jury, over objection. Obviously, the allegation that the Government witnesses had paid kickbacks to Walta and Rudd was prejudicial. Most certainly, however, it was not as prejudicial as the cross-examination of the defense witnesses, where it was brought to the jury's attention that Walta and Rudd had, in fact, *plead guilty* to the charge of accepting kickbacks. Once again, it is important to note, that the Petitioner herein was not charged jointly with Walta or Rudd, nor were there any allegations that he participated in any type of scheme with Walta or Rudd. Furthermore, there was no evidence presented that he had schemed with Walta and Rudd, indeed, the evidence presented by the Government in its Case-in-Chief succinctly and clearly pointed out the fact that no one Commissioner

knew of the business dealings between other Commissioners and suppliers.

As stated in *United States* v. *DeCicco*, 435 F.2d 478 (2d Cir. 1970):

> "Little discussion is needed to demonstrate that prior similar acts of misconduct performed by one person cannot be used to infer guilty intent of another person if it is not shown to be in any way involved in the prior misconduct, unless it be under a 'birds of a feather' theory of justice. Guilt, however, cannot be inferred merely by association. In any event, we conclude that the prejudice engendered by the admission into evidence of the prior acts of misconduct, even against Russell DeCicco and Gregory Parness, the doers thereof, far outweighed its legitimate probative worth, and that therefore, it was an abuse of discretion of the Trial Court to allow its admission through the admission of the testimony was accompanied by cautionary instructions to the jury." (At page 483).

In *DeCicco* four defendants were convicted for conspiracy to transport stolen artwork in interstate commerce. During the presentation of its case, the prosecution was permitted to elicit testimony from a government informant that shortly before engaging in the conspiracy to transport stolen artwork, two of the defendants were involved in a fencing operation to dispose of stolen artwork. On appeal, the Second Circuit overturned the convictions, holding that the prejudice to the defendant from admission of this evidence of other crimes outweighed its probative value regarding motive and intent.

DeCicco, which was relied on by Petitioner on Appeal obviously posed concern to the United States Court of

Appeals for the Tenth Circuit. As stated in the Tenth Circuit opinion:

> "Most of the evidence of Walta's and Rudd's illegal activities was introduced through Government witness, Hugh Thurman, who testified that his company paid kickbacks to 95% of the County Commissioners with whom his company did business. After Thurman described the methods used to pay kickbacks, the prosecution asked Thurman a specific question about who received kickbacks in Kingfisher County. Thurman identified all three County Commissioners by name. He also testified that all three Commissioners received kickbacks on vouchers representing joint purchases that contained all three names. The witness stated, however, that he did not tell any one County Commissioner that he was paying kickbacks to the others. The Government contends that this testimony was proper to show the scope of the scheme to defraud and to explain the particular vouchers.
>
> Thurman's testimony undoubtedly prejudiced Lightle, and in our view, the Government improperly questioned the witness about Walta and Rudd because they were not defendants and no conspiracy was alleged. However, defense counsel did not object to the improper questions. (Pages 5 and 6)"

As set forth hereinabove, however, the Petitioner's counsel did, in fact, object to each and every question relative to Walta and Rudd, with the exception of the initial question. Obviously, counsel for the Petitioner did not wish to call attention to the problem when it was initially presented, but when the Government continued to question about Walta and Rudd's activities, counsel for the Petitioner lodged timely objections. Apparently, in reliance upon the Brief of the Government on Appeal, the Tenth

Circuit incorrectly determined that the Petitioner did not object to the question relative to Walta and Rudd.

The Petitioner would submit that there is an absolute dearth of authority discussing the issue of improperly admitted evidence of guilty pleas of third parties. The Petitioner would submit that the very lack of authority is, in fact, telling. As the Petitioner argued on appeal, the trial court apparently relied upon Rule 404(b) of the Federal Rules of Evidence to allow the evidence of Walta's and Rudd's alleged crimes. Rule 404(b) provides as follows:

> "(b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such a proof of motive, opportunity, intent, preparation, plan, knowledged, identity of absence of a mistake or accident."

It is apparent from a reading of 404(b) that the other crimes, wrongs, or acts relate to actions of the particular defendant on trial, and not third parties who may or may not hold similar positions in relation to the Petitioner. The trial court also apparently allowed the evidence as proof of the scheme as alleged by the Government. Once again, however, it is important to note that the Petitioner was not charged with scheming with Walta or Rudd, nor was any such evidence presented. The United States relied on Appeal on the case of *United States* v. *Roylance*, 690 F.2d 164 (10th Cir. 1982). In *Roylance*, evidence was allowed showing that Roylance had defrauded local investors. This evidence of other crimes was distinct from the crime which was charged against *Roylance*, of violation of Title 18 U.S.C.

Section 1341. The Tenth Circuit agreed with the trial court that such evidence was highly probative of the existance of the very scheme generating the Government's case. The inapplicability of the *Roylance* decision is obvious. In Petitioner's case, the evidence presented was simply that Walta and Rudd allegedly received kickbacks from the Government's witnesses. Later, in cross-examination of the defense witnesses there was evidence presented that Walta and Rudd had plead guilty to the crime of receiving kickbacks. The other crimes evidenced in Petitioner's case were not evidence relating to any other crimes committed by the Petitioner, nor evidence of any scheme that the Petitioner was involved in. As noted in *United States* v. *Bass,* 562 F.2d 967 (5th Cir. 1977):

> "The test in this Circuit is whether such evidence was admitted for proper evidentiary purposes such as impeachment, whether there was improper emphasis or use of the police as substantive evidence, whether the defense counsel invited the error, the presence or absence of obejctions, whether the failure to object was a matter of trial tactics and whether the admission was harmless error. *United States* v. *King* 505 F.2d 602 (5th Cir. 1974)."

As counsel for the Petitioner did object to all of the questions relative to Walta and Rudd, with the sole exception of the original initial question, the United States Court of Appeals for the Tenth Circuit was incorrect in determining that the prejudicial impact of the questioning would have to be considered only under the Doctrine of Fundamental Error. As noted in *United States* v. *Renton,* 700 F.2d 154 (5th Cir. 1983):

> "While one persons guilty plea may not be used as associative evidence of guilt of another, *U.S.* v. *Baete,* 414 F.2d 782, 783 (5th Cir. 1969), objection should be made at the time such guilty plea is made evident to the jury. No such objection was made here. In the absence of such timely objection, we have held that reversal is not proper unless the 'error is so patent as to have seriously jeopardized the substantial rights of the accused.' *King,* 505 F.2d 605. In *United States* v. *Fleetwood,* 528 F.2d 528 (5th Cir. 1976), this Court set forth seven factors which should be considered in determining whether defendant's 'substantial rights' have been violated by the admission of a co-conspirators guilty plea. Among these factors are the presence or absence of a limiting instruction, whether there was a proper purpose in introducing the guilty plea, whether objection was entered, and whether, in light of all the evidence, the error, if any, was harmless beyond a reasonable doubt. 528 F.2d at 532 (at page 160).

The United States Court of Appeals for the Tenth Circuit, in its opinion affirming the Trial Court, recognized the serious prejudicial impact of the evidence relative to Walta and Rudd being allowed against the Petitioner. The Tenth Circuit determined incorrectly, however, that the questioning was unobjected to. As set forth hereinabove, counsel for the Petitioner lodged timely objections. It is also important to note that the prejudicial impact of the Government's testimony during its Case-in-Chief, was not nearly as devastating, as was the evidence that Walta and Rudd had, in fact, pleaded guilty to the charge of receiving kickbacks.

CONCLUSION

The opinion for the United States Court of Appeals for the Tenth Circuit affirming the Trial Court's conviction of the Petitioner herein, apparently ignores and is in direct conflict with authority from the Fifth and Second Circuits, which clearly hold that it is improper, prejudicial, and reversible error to allow evidence of other crimes and guilty pleas of third parties to be used against a criminal defendant. As such, and for the reasons set forth hereinabove, the Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

MITCHELL A. LEE
Counsel of Record

GENE STIPE
Stipe, Gossett, Stipe, Harper, Estes, McCune and Parks
P.O. Box 53567
Oklahoma City, Oklahoma 73152
(405) 524-2268

Attorneys for Petitioner

May, 1984

CERTIFICATE OF SERVICE

I hereby certify that Service of this Petition for Writ of Certiorari was made this ..... day of May, 1984, by depositing copies of the same with first class postage prepaid, addressed to:

Solicitor General
Department of Justice
Tenth and Constitution Avenue
Washington, D.C. 20530

Mr. William Price
United States Attorney
United States Courthouse
Oklahoma City, Oklahoma 73102

All parties required to be served have been served.

Mitchell A. Lee

APPENDIX A

PUBLISH

[Filed Feb. 29, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee.	)	
v.	)	No. 82-2477
BILLY L. LIGHTLE, Defendant-Appellant.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CR-82-121-T)

Robert K. McCune of Stipe, Gossett, Stipe, Harper, Estes, McCune & Parks, Oklahoma City, Oklahoma, for Defendant-Appellant.

Susie Pritchett, Assistant United States Attorney (William S. Price, United States Attorney, and James D. Bednar, Assistant United States Attorney, on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before McWILLIAMS and LOGAN, Circuit Judges, and COOK, District Judge.*

LOGAN, Circuit Judge.

Defendant Billy L. Lightle, a former county commissioner in Kingfisher County, Oklahoma, appeals his conviction on forty-four counts of mail fraud, in violation of

*Honorable H. Dale Cook, Chief United States District Judge for the District of Oklahoma, sitting by designation.

18 U.S.C. § 1341, three counts of extortion, in violation of 18 U.S.C. § 1951, and four counts of submitting false tax returns, in violation of 26 U.S.C. § 7206(1). Defendant's assertions on appeal are that (1) the trial court erred in denying defendant's motion for acquittal because the mailings of county warrants were insufficiently related to the alleged scheme to defraud to provide the nexus for mail fraud convictions; (2) the trial court should have granted defendant's motion for change of venue because of excessive pretrial publicity; (3) the trial court should have granted defendant's motion in limine to suppress certain testimony and evidence of crimes not charged; and (4) the trial court erred in allowing the introduction of evidence concerning the illegal activities of two other Kingfisher County commissioners. We affirm.

Lightle's indictment resulted from a three-year investigation of corrupt practices of Oklahoma county commissioners. Lightle was charged with devising a scheme to defraud the citizens of Kingfisher County by depriving them of their right to have county business conducted free from corruption and undue influence. Specifically, Lightle was convicted for receiving kickbacks in return for placing orders for road and bridge building materials and supplies with certain vendors.

I

Lightle argues that the trial court should have granted his motion for acquittal at the conclusion of the evidence because the government failed to show that the mailings in this case were in furtherance of a scheme to defraud. Lightle contends that although the evidence tended to show he had schemed to defraud the county by accepting bribes or kickbacks, he did not use the mails "for the purpose of executing the scheme" as the federal statute requires. Lightle also contends that since the county was compelled to mail warrants to pay for materials and supplies, the mailings fall outside the scope of the mail fraud statute under *Parr* v. *United States*, 363 U.S. 370 (1960). We considered and re-

jected virtually identical arguments in similar factual contexts in *United States* v. *Primrose*, 718 F.2d 1484, 1489-91 (10th Cir. 1983), and *United States* v. *Gann*, 718 F.2d 1502, 1504 (10th Cir. 1983). Under the authorities and analyses of those cases, we conclude that Lightle's arguments are meritless.

II

Lightle argues that the trial court erred in denying his pretrial motion to transfer the case to another district because of excessive pretrial publicity concerning the county commissioner scandal. For support he cites *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). We considered this identical contention in *United States* v. *Neal*, 718 F.2d 1505, 1510-11 (10th Cir. 1983). Based on the authorities and analysis in that case and taking into account defendant's concession that there was little pretrial publicity directed at him personally, we conclude that the trial court did not abuse its discretion in denying defendant's motion for change of venue. *See United States* v. *Hueftle*, 687 F.2d 1305, 1310 (10th Cir. 1982) (en banc).

III

Lightle asserts that the trial court erred in failing to sustain his motion in limine with respect to: (1) a statement by Leon Hicks, a supplier, that defendant would not do business with him because Hicks would not pay large enough kickbacks, (2) evidence of sales and resulting kickbacks that were not included in the indictment, and (3) sales not set out in the indictment allegedly constituting Hobbs Act violations. In *Primrose* this Court rejected contentions similar to those in (2) and (3). 718 F.2d at 1491-92. The determination of whether the probative value of introducing other crimes, wrongs, or acts of the defendant under Fed. R. Evid. 404(b) outweighs the prejudice to the defendant is within the discretion of the trial judge. *United States* v. *Nolan*, 551 F.2d 266, 271 (10th Cir.), *cert. denied*, 434 U.S. 904 (1977). After reviewing the record, we hold

that the challenged evidence was probative of a scheme to defraud and there was no abuse of discretion in the trial court's decision to admit the evidence.

IV

The only contention Lightle makes that gives us pause is that the trial court erroneously admitted evidence concerning the activities of two other Kingfisher County commissioners, Walta and Rudd, both of whom had previously pleaded guilty to charges of receiving kickbacks. We agree with *United States* v. *DeCicco*, 435 F.2d 478 (2d Cir. 1970), which defendant relies on, that acts of misconduct performed by one person cannot be used to imply the guilt of another who is not shown in any way to be involved in the misconduct of that other person. In *DeCicco* four defendants were convicted for conspiracy to transport stolen artwork in interstate commerce. During the presentation of its case, the prosecution was permitted to elicit testimony from a government informant that shortly before engaging in the conspiracy to transport stolen artwork two of the defendants were involved in a fencing operation to dispose of stolen art work. On appeal, the Second Circuit overturned the convictions, holding that the prejudice to the defendant from admission of this evidence of other crimes outweighed its probative value regarding motive and intent.

Most of the evidence of Walta's and Rudd's illegal activities was introduced through government witness Hugh Thurman, who testified that his company paid kickbacks to 95% of the county commissioners with whom his company did business. After Thurman described the methods used to pay kickbacks, the prosecution asked Thurman a specific question about who received kickbacks in Kingfisher County. Thurman identified all three county commissioners by name. He also testified that all three commissioners received kickbacks on vouchers representing joint purchases that contained all three names. The witness stated, however, that he did not tell any one county commissioner that he was paying kickbacks to the others. The government

contends that this testimony was proper to show the scope of the scheme to defraud and to explain the particular vouchers.

Thurman's testimony undoubtedly prejudiced Lightle, and in our view the government improperly questioned the witness about Walta and Rudd because they were not defendants and no conspiracy was alleged. However, defense counsel did not object to the improper questions. Thus, the court was given no opportunity to sustain an objection or to admonish the jury on the problem of guilt by association. In *DeCicco* the government witness who testified concerning the prior theft was crucial to the government's case. Here, in view of the plethora of government witnesses who gave damaging testimony and the overwhelming evidence of guilt in the record as a whole, the admission of evidence concerning Walta and Rudd in the government's case in chief was not plain error requiring reversal. *See United States* v. *Brewer*, 630 F.2d 795, 801 (10th Cir. 1980).

The trial court also admitted evidence of the crimes of Walta and Rudd during cross-examination of defense witnesses by the government. In presenting his case, Lightle called as witnesses several individuals who had done business with him when he was county commissioner. These vendors testified that Lightle had never asked them for a kickback and that they had never paid him one. On cross-examination the government sought to undermine this testimony by asking these witnesses whether they had done business with Walta and Rudd, whether they had ever paid them kickbacks, and whether they were aware that Walta and Rudd had pleaded guilty to taking kickbacks. We conclude that the trial court did not abuse its discretion by allowing the government to rebut the favorable inferences developed by Lightle during direct examination of his witnesses. *See* Fed R. Evid. 401, 402, 403.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee-Plaintiff,	)	
-vs-	)	No. 82-2477
BILLY LIGHTLE, Defendant-Appellant.	)	

PETITION FOR REHEARING

COMES NOW the Appellant, and Petitions this Court for a Rehearing. In support of his Petition for Rehearing, Appellant would point out to the Court that it has apparently overlooked or misconstrued certain arguments raised by Appellant in his Appeal.

Concerning the cross-examination of defense witnesses, this Court held the admission of evidence of guilty pleas by two fellow Kingfisher County Commissioners was not an abuse of discretion as it allowed the government to rebut favorable inferences elicited by defense counsel on direct examination. The Court seemed to place emphasis on the fact that the testimony was allowed for impeachment purposes.

The Appellant contends the evidence regarding the guilty pleas of the two other Commissioners was totally irrelevant as Appellant was not charged as a co-defendant or co-conspirator with the two other Commissioners from Kingfisher County. Further the guilty pleas would not be admissible for impeachment purposes as it would be impeachment on an issue collateral to testimony given by defense witnesses. Under Federal Rules of Evidence 803 (22) the government could admit evidence of the guilty pleas if necessary to prove any fact essential to sustain the judgment. However, the notes of the Advisory Committee on proposed rules state with regard to Rule 803 (22):

> "While these rules do not in general purport to resolve constitutional issues, they have in general been drafted

with a view to avoiding collision with constitutional principles. Consequently, exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby* v. *United States,* 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), error to convict possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves" Note paragraph (22), Rule 803, Title 28, Rules of Evidence, U.S.C.A. p.594, also see *United States* v. *Koger,* 646 F.2d 1194 (7th Circuit 1981).

The Tenth Circuit Court of Appeals has previously stated in *Butler* v. *United States,* 408 F.2d 1103 (10th Circuit 1969):

"Questions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflects upon his integrity or truthfulness, or so pertaining to his personal turpitude, such as to indicate such moral depravity or degenerecy on his part as would likely render him insensible to the obligations of an oath to speak the truth. . . in criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude, and on rebuttal the record of such conviction is admissable."

The guilty pleas of the two other Commissioners for taking kickbacks were totally irrelevant for purposes of impeaching the defense witnesses. The credibility of the defense witnesses was at issue not the credibility of the other two Commissioners. The evidence of the guilty pleas was introduced through the government prosecutor and not through the defense witnesses. The statement by the government prosecutor was highly prejudicial, irrelevant, and not admissable for any purpose.

The Court also abused its discretion by failing to balance any probative value of the prosecutor's statement against the highly prejudicial nature of the statement and the great danger of confusion of issues by introduction of collateral matters. In *United States* v. *Mangiameli,* 668 F.2d 1172 (10th Circuit 1982), this court indicates the trial court is to exclude even relative admissible evidence if after balancing its probative value against competing considerations its cost outweighs its benefits.

It is Hornbook law that the guilty pleas of co-defendants cannot be considered as evidence against those who are on trial because a defendant has a right to have his guilt or innocence determined by the evidence presented against him, and not based upon what has happened with regard to a criminal prosecution against someone else. *See United States* v. *Restaino,* 369 L.2d 544 (1966) and *United States* v. *DeCicco,* 435 F.2d 478 (2nd Circuit 1970). The Appellant would also direct the court's attention to language quoted in *United States* v. *Baez,* 703 F.2d 453 (10th Circuit 1983) to the effect that:

> "There's no need to advise the jury or its prospective members that someone not in court, not on trial, and not to be tried, has pleaded guilty. Prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious."

It is obvious that the trial court committed clear error in admitting this highly prejudicial irrelevant evidence concerning the guilty pleas of the two other Kingfisher County Commissioners. The Court allowed a government witness to testify that 95% of the County Commissioners with whom he did business were paid kickbacks. This witness further testified that he had paid kickbacks to all three County Commissioners in Kingfisher County. The government prosecutor was thereafter allowed to present evidence that the two other Kingfisher County Commissioners had pleaded

guilty to receiving kickbacks. This evidence was irrelevant to any purpose other than to establish guilt by association which this court has acknowledged to be inadmissible. This court has indicated in *United States* v. *Baez*, (Supra):

> "If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

Appellant would assert that the improper questioning of the government witness concerning the two other commissioners and the government prosecutor's statements that the two other commissioners had pleaded guilty to receiving kickbacks has denied him his right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else. Appellant would further assert that the jury considered the proof of the other two commissioners' guilt as proof of his own guilt and he was thereby deprived of a fair and impartial verdict. There can be no doubt that the guilty pleas of the two other commissioners necessarily implicate the Appellant. Here there was not even a cautionary instruction given to the jury not to consider the guilty pleas of the two other commissioners in determining the innocence or guilt of Lightle.

WHEREFORE, the Appellant respectfully requests this Honorable Court to grant his Petition for Rehearing and to hold further argument in this case or in the alternative, to reverse the conviction on all counts for the above cited reasons and if necessary to remand the case to the District Court for further proceedings.

Respectfully submitted,

STIPE, GOSSETT, STIPE, HARPER,
ESTES, McCUNE & PARKS

[Certificate of Mailing omitted this printing]

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM—March 27, 1984

Before Honorable Robert H. McWilliams, Honorable James K. Logan, Circuit Judges, and Honorable H. Dale Cook*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 82-2477
BILLY LIGHTLE, Defendant-Appellant,	)	

This matter comes on for consideration of the petition for rehearing filed by appellant in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

*United States District Court Judge for the District of Oklahoma, sitting by designation.

(2)

No. 83-1863

Office-Supreme Court, U.S.
FILED
AUG 9 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

BILLY L. LIGHTLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

13pp

QUESTION PRESENTED

Whether the court of appeals properly applied the plain error standard in reviewing petitioner's claim that evidence of other crimes should not have been admitted into evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes and rules—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1863

BILLY L. LIGHTLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 728 F.2d 468.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 1984. A petition for rehearing was denied on March 27, 1984 (Pet. App. C). The petition for a writ of certiorari was filed on May 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on 44 counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of extortion, in violation of 18 U.S.C. 1951; and four counts of submitting false income tax

returns, in violation of 26 U.S.C. 7206(1) (Pet. App. 1a-2a). Petitioner was sentenced to five years' imprisonment on each mail fraud count, 12 years' imprisonment on each extortion count, and three years' imprisonment on each tax count, all sentences to run concurrently. In addition, he was fined $10,000 on one of the extortion counts.

1. Petitioner was one of three county commissioners for Kingfisher County, Oklahoma. The evidence at trial showed that from 1975 through early 1981 petitioner engaged in a scheme to defraud the citizens of the county of their right to a fair, open, and honest government by requesting and receiving kickbacks in connection with the purchase of construction materials and equipment and cleaning equipment and supplies (Tr. 250-273, 334, 418-419, 469, 497-501, 565, 645, 676-677, 683-684). Those who paid kickbacks to petitioner testified that the amount of the kickback — five to ten percent of the purchase price — was calculated either as part of the quoted price or as a reduction in the value of any equipment taken in trade (Tr. 253, 255-256, 331, 336-337, 405-406, 412, 416-417, 463-464, 494-496, 586, 642, 668-670). When the scheme was in full operation, a salesman or broker who received an order from petitioner completed the order and filed a claim or invoice. The claim was paid with a county warrant, which was sent through the mail. After the warrant was received, the salesman or broker personally paid petitioner a cash kickback. Tr. 335-336, 338-339, 405-406, 409, 470, 494-496, 587-588, 676-677, 704-706. Salesmen or brokers who did not pay kickbacks did not obtain business with the county (Tr. 334, 407, 470, 586, 668-670). Petitioner did not report the kickbacks he received as income on his tax returns (Tr. 609-612, 616, 617).

2. The court of appeals affirmed (Pet. App. 1a-5a). It rejected petitioner's claim that the district court committed reversible error in admitting testimony that George Walta

and Floyd Rudd, the two other commissioners for Kingfisher County, had accepted kickbacks and had pleaded guilty to charges related to receipt of kickbacks (*id.* at 4a-5a).[1] The court of appeals agreed that testimony that Walta and Rudd had received kickbacks, introduced during the government's case in chief, should not have been admitted, since Walta and Rudd were not defendants and no conspiracy was charged. The court noted, however, that petitioner had not objected to the questions at issue and had thereby deprived the trial court of the opportunity to exclude the testimony or to admonish the jury not to infer guilt on the part of petitioner from the acts of the other commissioners.[2] In light of the overwhelming testimony from government witnesses that they had paid kickbacks to petitioner, the court of appeals concluded that admission of the testimony regarding receipt of kickbacks by Walta and Rudd was not plain error. Pet. App. 5a.

The court of appeals concluded that the government's cross-examination of defense witnesses, which revealed in several instances that Walta and Rudd had pleaded guilty to taking kickbacks, was permissible impeachment of the witnesses. Each witness had testified on direct examination

---

[1]The court of appeals also rejected petitioner's contentions that the evidence failed to show that the mailings of the county warrants were in furtherance of the scheme to defraud (Pet. App. 2a-3a); that the district court erroneously denied his motion to change venue because of pretrial publicity (*id.* at 3a); and that the district court abused its discretion in admitting evidence of certain other wrongs of petitioner, not included in the indictment, pursuant to Fed. R. Evid. 404(b) (Pet. App. 3a-4a). Petitioner does not challenge these holdings in this Court.

[2]In fact, the trial court sua sponte offered to give a cautionary instruction unless petitioner opposed it (Tr. 346). After petitioner registered no objection (Tr. 347), the trial court cautioned the jury that evidence of wrongdoing by the other commissioners should be considered only on the issue of the existence of a scheme and did not constitute evidence of petitioner's involvement in the scheme (Tr. 359).

that petitioner had never asked him for a kickback and that the witness had not paid any kickbacks to petitioner. On cross-examination, each witness testified that he had done business with Walta and Rudd, had never paid them kickbacks, but knew that they had resigned from office and had pleaded guilty to accepting kickbacks. The court of appeals concluded that the trial court did not abuse its discretion in permitting the government to rebut the favorable inferences petitioner had developed on direct examination. Pet. App. 5a.

ARGUMENT

Petitioner contends (Pet. 11-26) that the trial court erred in admitting testimony that Walta and Rudd, the two other county commissioners, had received kickbacks and had pleaded guilty in connection with receipt of those kickbacks. That contention is without merit. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. The primary thrust of petitioner's argument is that the court of appeals should not have applied the plain error standard, because, contrary to the court of appeals' belief (see Pet. App. 5a), petitioner did object at trial to introduction of the evidence concerning Walta and Rudd.[3] That fact-bound claim is not supported by the record.

Petitioner acknowledges (Pet. 12) that he made no objection at the time the prosecutor first elicited testimony from a government witness that kickbacks were paid to all three Kingfisher County commissioners (see Tr. 249). He attempts

---

[3]We note that in his petition for rehearing petitioner did not contend that the court of appeals had overlooked the objections he now claims he made during the trial. See Pet. App. 1b-4b.

to excuse that failure by citing "obvious tactical considerations" (Pet. 12). In response to subsequent references to the kickbacks paid to the other commissioners, petitioner's counsel merely objected that the evidence was "incompetent, irrelevant, and immaterial," "[d]oesn't prove or disprove anything," or "has no bearing on this" (Tr. 259, 260, 262, 287, 325). At no time did petitioner's counsel ask the court for a limiting instruction in connection with the testimony about the other commissioners.

The trial judge on his own initiative noted that, although he believed evidence of kickbacks paid to the other commissioners was properly admitted to show the general scheme charged in the indictment, "it would be far more correct if I gave a cautionary instruction" concerning that evidence unless counsel opposed such an instruction (Tr. 346). Before the next recess the trial judge instructed the jury that the evidence concerning the other commissioners was admitted only on the issue of the existence of the scheme charged in the indictment and should not be considered evidence of petitioner's involvement in the scheme (Tr. 359). He reminded the jury of this instruction later in the trial, during the testimony of a defense witness (Tr. 1064). The trial judge repeated the instruction during his final charge to the jury (Tr. 1236).

During cross-examination, several of petitioner's witnesses testified that they had transacted business with all three county commissioners and had not paid kickbacks to any of them, but acknowledged that they were aware that Walta and Rudd had resigned and pleaded guilty to taking kickbacks (Tr. 792-797, 812-816, 987). Petitioner objected in general terms on two occasions, citing irrelevancy and the fact that Rudd was not on trial. See Pet. 19-20. In the case of one defense witness, petitioner's counsel failed to object when the prosecutor asked about the witness's knowledge of Walta's and Rudd's guilty pleas (Tr. 987, 991). After the

witness was excused, petitioner's counsel objected in general terms to questions about Walta and Rudd, but did not complain specifically about the reference to their guilty pleas (Tr. 991-992). The trial court then offered to give another cautionary instruction, but petitioner's counsel advised that he preferred not to call attention to the testimony and that he would "leave it go at this time" (Tr. 992-993).

Under Fed. R. Crim. P. 51 and Fed. R. Evid. 103(a)(1), a party is charged with objecting to alleged error at the time it occurs, with sufficient specificity so that the court knows the basis for the objection and the action the party requests. Failure to state an objection in a timely and specific manner amounts to waiver of the objection, and any alleged error not properly objected to will be addressed on appeal only if it constitutes plain error. Fed. R. Crim. P. 52(b); Fed. R. Evid. 103(a)(1) and (d). Moreover, "if a general objection is overruled when a specific objection should have been made, the party is precluded from asserting the proper objection on appeal." *United States* v. *Wilson*, 690 F.2d 1267, 1274 (9th Cir. 1982), cert. denied, No. 82-6591 (Oct. 3, 1983).

Here petitioner either did not object at all to the error he now alleges, or he objected in terms so general that the court could not have been expected to understand the basis for his objection. Although petitioner now complains that there was only one cautionary instruction (Pet. 20; but see page 5, *supra*), he himself never requested such an instruction during the trial. Indeed, petitioner declined the trial court's offer to renew a cautionary instruction after the cross-examination of defense witnesses elicited the fact that Walta and Rudd had pleaded guilty (Tr. 991-993). Thus, petitioner clearly waived his right to have his claims considered on appeal under a standard other than plain error.

2. Admission of the testimony concerning Walta and Rudd clearly did not amount to plain error, if indeed it was error at all.[4] The testimony of several government witnesses that they had paid kickbacks to Walta and Rudd was not introduced to suggest petitioner's guilt; rather, it served to explain generally the manner in which vendors paid kickbacks and to explain particular vouchers that showed the names of all three county commissioners. As the court of appeals recognized (Pet. App. 5a), the testimony of defense witnesses that they had never paid kickbacks to Walta and Rudd but were aware that those individuals had pleaded guilty to receipt of kickbacks served to rebut favorable inferences petitioner's counsel had developed through direct testimony that the witnesses had never paid kickbacks

---

[4]In concluding that questioning of government witnesses about Walta and Rudd was improper, the court of appeals cited *United States* v. *DeCicco*, 435 F.2d 478 (2d Cir. 1970), in which the court reversed convictions on the ground that evidence of other crimes should not have been introduced. Pet. App. 4a. We agree with the general proposition for which the court of appeals cited *DeCicco* — that the acts of one person cannot be used to imply the guilt of another who is not shown to be involved in the misconduct of the former. But *DeCicco* is clearly distinguishable from this case.

The testimony at issue in *DeCicco* was repeated by several witnesses, apparently at some length. Defense counsel objected on each occasion. See 435 F.2d at 481-482. In addition, in *DeCicco* the acts of which evidence was introduced had taken place prior to the scheme at issue in the trial. The government claimed that the evidence would help to establish intent of the defendants, but the court concluded that intent was not at issue under either the prosecution or defense theories of the case. In the court's view, the cautionary instructions given by the trial court were not sufficiently specific. The strength of the government's case in *DeCicco* was questionable, since the defense had mounted a "telling challenge" to the credibility of the government's principal witness. *Id.* at 483 n.6. Under these circumstances, the court concluded that the prejudice to the defendants outweighed the probative value of the evidence. As the discussion in the text indicates, the circumstances of this case are quite different from those in *DeCicco*.

to petitioner.[5] As the trial court noted (Tr. 991-992), the references to Walta and Rudd were brief. In addition, the government witnesses testified that they did not tell petitioner about their separate dealings with Walta and Rudd. See, *e.g.*, Tr. 263-264, 338-339. Thus, it is unlikely that the jury would have inferred petitioner's guilt from the testimony about actions of the other commissioners.

The trial court gave curative instructions during trial and in the final charge to the jury. See page 3 note 5, 5, *supra*. It offered to give additional curative instructions, but petitioner's counsel declined the offer, apparently for tactical reasons. The evidence of petitioner's guilt, in the form of testimony by numerous witnesses that they paid kickbacks to petitioner over a number of years, was overwhelming. See Pet. App. 5a. Thus, assuming admission of the testimony concerning Walta and Rudd was error, it appears to have been harmless. In these circumstances, admission of the testimony cannot be said to constitute plain error. See, *e.g.*, *United States* v. *Veal*, 703 F.2d 1224, 1228-1229 (11th Cir. 1983); *United States* v. *Mattoni*, 698 F.2d 691, 694-695 (5th Cir. 1983); *United States* v. *Brewer*, 630 F.2d 795, 801 (10th Cir. 1980); *United States* v. *Bass*, 562 F.2d 967, 969-970 & n.3 (5th Cir. 1977).

---

[5]The fact that the cross-examination testimony was used for purposes of rebuttal appears to have been the basis for the court of appeals' conclusion (Pet. App. 5a) that admission of that testimony was not an abuse of discretion. In this Court petitioner does not specifically challenge the court of appeals' conclusion that the cross-examination constituted proper rebuttal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

AUGUST 1984

DOJ-1984-08